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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PETITIONER.

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ON WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE PETITIONER.

I.

Statement of Facts.

Petitioner is a citizen of the United States. He was twenty-one years of age at the time of the trial in May, 1932. He was indicted, tried, convicted and sentenced to death in the Superior Court for the County of Middlesex of the Commonwealth of Massachusetts, upon an indictment charging petitioner and two others (Donnellan and Garrick) with the capital crime of murder in the first degree. After arraignment, the court appointed counsel to defend petitioner. After the trial had begun, and the impanelling of the jury had been completed, the assistant district attorney moved

for a view by the jury of the filling station and the locality, the scene of the alleged crime. This filling station was a short distance from the court and within the county and judicial district of the court. It was brought to the attention of the court at the hearing of the motion for view that the assistant district attorney had recently taken a co-defendant (Garrick) who was not to be tried, but was to be used as a Government witness, to the scene and had gone over the case with him there. Petitioner objected to any view by the jury unless he was present, and claimed constitutional protection. Petitioner thereupon filed a written motion insisting upon his right, guaranteed by State and Federal constitutions, to be personally present at the view. Petitioner further based his motion—"that it is necessary to acquaint his counsel with facts necessary to his defense." The motion also referred to the taking of Garrick to the scene by the assistant district attorney, already alluded to. The court denied that the petitioner had a right to be personally present at the view, refused to permit the petitioner to be personally present at the view, denied his written motion—to all of which petitioner took an exception. A view was then had by the jury without the personal presence of the petitioner, and his counsel was obliged to attend without the benefit of such assistance as petitioner could give if he were personally present. The trial justice was present with the jury at the view, so were the court officers, the court stenographer, and counsel appointed on both sides to attend. At the view the trial justice formally directed and controlled the proceedings. The trial justice at the view stated to the jury agreements of counsel as to facts and changes in the scene that had occurred since the shooting. What occurred at the view was taken down stenographically and appears in the transcript of the evidence as any other part of the trial (see Appendix 1 to petition). In the charge

to the jury the trial judge directed without reservation, in accordance with adjudicated cases in Massachusetts, that full use of what was observed by the jury at the view could be used by the jury as evidence in the case upon the issue whether petitioner had committed the crime of murder in the first degree (see Appendix 1 to petition). Petitioner had been held in custody without bail since his arrest in April, 1932. The jury were not permitted to separate during the trial until after verdict.

Federal question was specially set up and claimed and brought to the attention of the court at every stage—orally and by written motion at the time of the view—in the brief filed on behalf of petitioner in the Supreme Judicial Court of Massachusetts—and by oral argument in said court. Federal question is discussed in the opinion of the court (see Record, page 30, point 4).

ARGUMENT

I.

When Mr. Justice Hammond at the trial of the petitioner refused to permit him to be present at the view of the scene of the alleged crime, the justice virtually excluded the petitioner from being present when evidence was taken by the jury upon which the petitioner could be convicted of a capital offense. The action of the justice was a denial of the benefit of due process of law within the meaning of the XIV Amendment.

Powell v. *Alabama*, 287 U. S. 45 (1932).

It is subtle reasoning to draw a distinction between testimony of witnesses sworn in and testifying in the court room, from all other means of evidence that may be used in

the trial of a capital case to reach a conviction. To justify the proposition that the right of personal presence of the accused in a capital case only applies to testimony of witnesses is contrary to reason and to all human instincts of justice Yet, authority which it is claimed supports the course followed by the trial court must rest upon logic which permits a trial **to be suspended** to take evidence.

See authorities collected and discussed in Appendix C. to Brief filed in support of petition.

The position that the encroachment of constitutional rights of the petitioner must occur within the limit of the trial court room is likewise untenable, particularly in view of what actually took place at the trial of the petitioner.

At the view by the jury, the trial justice was present in his official capacity as judge, so also in their official spheres were the court officers and the court stenographer, and all counsel in the case. The trial justice formally directed and controlled proceedings. He stated to the jury agreements of counsel as to facts and changes in the scene that had taken place since the shooting; and in fact, conducted himself as he would on the bench. What took place was taken down stenographically as other parts of the trial and in the same manner that testimony was taken at the trial, all of which appears in the transcript of the evidence now before this tribunal. As to the practical effect of what the jury saw and heard at the view, no distinction was made between knowledge thus acquired, or by means of other evidence introduced in the course of the trial. Thus the jury were authorized to use such knowledge to bring in a conviction of first degree murder and it must be assumed that the jury did so. Thus the jury were told by the presiding judge in his charge:

"Now, what have you before you on which to form your judgment and to render your finding and verdict? THE VIEW, the testimony given by the witnesses, and the exhibits comprise the evidence that is before you." (Page 966 of the Transcript of the Evidence. Capitalization of words is that of counsel.)

"As I say, it is for the jury to say from all the evidence before you taking into consideration what it is contended outside of the evidence that you have relative to the firing of any shot—the conduct of any of the parties just before and just after, AND ANY APPEARANCES OR ANY EVIDENCE THAT YOU MAY GATHER FROM THE APPEARANCE OF THE LOCALITY ITSELF, [see footnote 1] the testimony relative to the result of the shot, the course of it, and what was done." [See footnote 2.] (Pages 972, 973, Transcript of the Evidence. Capitalization is that of counsel.)

Footnote 1. At the view, the jury could notice the smallness of the interior of the gas station; the way and direction of the swinging of the door; how far it projected into the room when open; its close proximity to other parts of the room; how far a person trying to get around the door could shoot so as to produce the wound on Kiley's left chest according to where he stood when he was shot; the position of the oil racks upon which the ejected empty shell was found; and where the oil racks were at the time of the shooting; the location of the window in which a hole caused by the bullet was discovered to determine the direction of the bullet; the position of the telephone booth from which the deceased suddenly emerged; and other conditions, were all important and the only corroborative assistance available to petitioner. This knowledge so obtainable by the jury at the view could be more easily understood and grasped by the average mind, than any detailed description by plan or word of mouth. The petitioner was held without bail under a capital charge, and was absolutely helpless to defend himself or to assist his counsel. He was also prevented by the excluding action of the trial justice from being able to refresh his memory as to appearances at the station on the fatal night where he had been but a few moments under abnormal conditions. Moreover, changes in the scene had taken place thereafter and before the jury arrived. Of these changes the defendant has not even now the knowledge, but the changes were pointed out by the judge to the jury at the suggestion of the prosecuting attorney.

Footnote 2. Because of specifications filed by the Commonwealth, it became of importance in the proof whether Donnellan or Snyder actually fired the shot, and the trial justice ruled to the jury that if the evidence did not prove that Snyder fired the shot, there was a variance between the specifications and the proof and that Snyder could not be convicted of murder in the first degree with deliberately premeditated malice aforethought. (See p. 973 of Transcript of Evidence.)

II.

The fundamental right and importance of personal presence of the accused at a criminal trial, particularly in capital cases, has been stressed by judicial expression whenever occasion has arisen.

This Court has said:

In *Lewis* v. *United States*, 146 U. S. 370, 372 (1892):

> "A leading principle that pervades the entire law of criminal proceedings is, that after indictment found, nothing shall be done in the absence of the prisoner."

And in *Hopt* v. *Utah*, 110 U. S. 574, 578, 579 (1884):

> "*His* (the prisoner's) *life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and the court and triers.* The necessity of the defense may not be met by the presence of his counsel only."

In *Schwab* v. *Bergren*, 143 U. S. 444, 448 (1892):

> "The personal presence of the accused from the beginning to the end of a trial for felony, involving life or liberty, as well as the time final judgment is rendered against him, may be and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

The principle has its roots in the early history of the common law.

See *Rex* v. *Ladsingham*, Sir T. Raymond Reports, 193 (1682).

In 1 Cooley, *Constitutional Limitations* (8th ed.) (1927), p. 667, the author states:

"In cases of felony, when the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment."

See 1 Bishop, *New Crim. Proc.* (2d ed.) (1913), sec. 273.

In *French* v. *State*, ~~84~~ 85 Wis. 400, 411 (1893), the court said:

"These great common law requirements have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face * * * These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised."

See also *Maurer* v. *State*, 43 N. Y. 1 (1870).
1 *Zoline Federal Crim. Law & Procedure*, 254.

The protection of the Massachusetts Declaration of Rights, Article 12, and General Laws of Massachusetts, Chapter 278, section 6, are but declaratory of the common law and is found generally in all State constitutions.

Com. v. *McCarthy*, ~~165~~ 163 Mass. 458, and cases cited.
Com. v. *Cody*, 165 Mass. 133.
Hooker v. *Com.*, 13 Grat. 763, 766.

Such rights do not relate to matters merely procedural even though they may be the subject of waiver. Nor are the merits of the case involved when paramount substantial rights are invaded.

Com. v. *Harris*, ~~213~~ 231 Mass. 584 (1919).
Lebowich, Ptr., v. *Com.*, 235 Mass. 357 (1920).
Powell v. *Alabama*, *supra*, at page 3.
See Parker, C. J., in *Com.* v. *Parker*, 2 Pick. 550, 551 (1824).
Com. v. *Knapp*, 9 Pick. 496, 515, 516 (1830).

The right of personal presence comes within the pale of "an immutable principle of justice which is the inalienable possession of every citizen of a free government."

Twining v. *New Jersey,* 211 U. S. 78, 113.

"* * * and which no member of the Union may disregard."

Holden v. *Vardy,* 169 U. S. 366, 389.

The serious handicap of a prisoner charged with a capital offense in the conduct of his defense and in assisting counsel, by reason of the custody and restraint incident to a capital case, has been judicially noticed in the leading case of *Diaz* v. *United States,* 223 U. S. 442, 455.

All the fundamental safeguards of the criminal law against oppression and injustice rest upon broad grounds of fair play. They are not to be narrowed by technical interpretation, or to be sacrificed or made to yield to mere temporary expediency, or more expeditious processes of trying cases.

Moore v. *Dempsey,* 261 U. S. 86.
Cooke v. *United States,* 267 U. S. 517.
Tunney v. *Ohio,* 273 U. S. 510.
Lebowitch, Ptr., v. *Com.,* 235 Mass. 357 (1920).
Powell v. *Alabama, supra.*

III.

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense.

Powell v. *Alabama, supra.*

Such protection, to be more than meaningless pretense, must assure an accused whose life is imperilled by judicial process, to **see through his own eyes, hear through his own ears,** and to **act through his own powers of reasoning,** not infrequently his best means of establishing innocence. No

one can be substituted to exercise these faculties for him, against his will, when he chooses to personally exercise this acknowledged prerogative.

> "* * * to be fully heard in his defense **by himself**, or his counsel, **at his election.**"
>
> *Massachusetts Declaration of Rights, Article* 12.

Massachusetts statutes have never interfered with the fundamental right of a defendant in a criminal case to be present at view. General Laws, Chapter 278, Section 6, provides that "A person indicted for a felony shall not be tried unless he is personally present at the trial." And the only statute relating to view in a criminal case was passed in 1836, and in the simplest language thus: "The Court may order a view by a jury impanelled to try a criminal case."

Rev. Stat. 1836, Chap. 137, sec. 10.

See also sec. 9 (Sec. 10 is now General Laws, Ter. Ed., Chap. 234, sec. 35; and sec. 9 is Chap. 278, sec. 6).

No limitation upon the legislative power of Massachusetts is sought to be imposed in this case. It is not conceded, however, that such limitation upon State action does not exist under the Fourteenth Amendment.

See remark of Mr. Justice Moody in *Twining* v. *New Jersey, supra,* at p. 99.

The relief sought by the petitioner, therefore, does not conflict with the principles of *Hurtado* v. *California,* 110 U. S. 516, and *Maxwell* v. *Dow,* 176 U. S. 581, and *Holden* v. *Hardy,* 160 U. S. 366, and *Twining* v. *New Jersey,* 211 U. S. 78, 111, and cases there collected.

Even in rate hearings, involving property rights and not life and liberty, the right to a full hearing is within the

protection of the due process clause of the Fourteenth Amendment.

> "Manifestly there is no hearing when the party does not know what evidence is offered or considered."
>
> *Int. Com. Comm.* v. *L. & N. R. Co.*, 227 U. S. 88, 93.

> "Nothing can be treated as evidence, **which is not introduced as such.**"
>
> *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288.

If what the jury saw at the view was evidence, and the accused was excluded from personally knowing what was being done to convict him, he was denied the right to a full hearing. If nothing can be treated as evidence which is not introduced as such, the introduction of evidence at the view, in the absence of and against the specific objection of the accused, was likewise a denial of due process.

IV.

On behalf of petitioner it is not conceded that the "actual practice (referring to whether Massachusetts practice requires the presence of the accused at view) **as disclosed by highly important capital trials has been that the whole subject has been treated as a function of the court."**

> See Statement of Chief Justice Rugg in *Commonwealth* v. *Dascalakis*, 246 Mass. 12 at 30.

Surely, no statute in Massachusetts requires exclusion of defendant from the view.

> *G. L.* (*ter ed.*) Chapter 234, Sec. 35.
>
> (See Rev. St. of Mass. (1836) Chap. 137, ss. 9 and 10.)

The earlier Massachusetts cases before the enactment of the statute permitting a view in criminal cases pointed out the apparent violation of "an important principle, that all the proceedings should be in the presence of the accused."

Parker, C. J. in *Com.* v. *Parker,* 2 Pick. 550, 551 (1824).

See *Com.* v. *Knapp,* 9 Pick. 496, 515, 516 (1830).

See also 3 *Wharton's Crim. Law* (9th Ed.), sec. 707, quoted in dissenting opinion in *Valdez* v. *U. S.,* 244 U. S. 432, 453.

The practice in numerous important capital cases set forth in Appendix 5 to Petition for Writ in this case is susceptible of an opposite interpretation of Massachusetts practice, if the language of the most noted judges and distinguished jurists in Massachusetts history is to be given its accepted meaning.

The language of an eminent judge, the late Justice John W. Hammond of Massachusetts, may be borrowed for this occasion:

> **"For more than a generation this view * * * has been adopted in the courts of this State, and men whose rights to life hinged upon its accuracy have been tried, convicted and sent to death."**
>
> *Com.* v. *Tucker,* 189 Mass. 457, 495.

That case is important, however, as indicating the extent to which actual practice in jury trials in capital cases controls and guides the determination of legal principles by courts of last resort.

The petitioner in his brief filed in the court below brought to the attention of that court the matters now urged, and again, in a motion for rehearing. (See Record, page 40.)

V.

To argue that a view is not evidence under Massachusetts decisions is futile.

See:

Com. v. *Chance,* 174 Mass. 245, 247 (1899).
Com. v. *Dascalakis,* 246 Mass. 12, 30.
Tully v. *Fitchburg RR.,* 134 Mass. 499 503 (1883).
Hanks v. *B. & O. RR.,* 147 Mass. 495, 499 (1888).
Smith v. *Morse,* 148 Mass. 407, 410 (1889).
Com. v. *Mercier,* 257 Mass. 353, 365 (1926).
Com. v. *Mara,* 257 Mass. 198, 209 (1926).
Com. v. *Handren,* 261 Mass. 294, 297.
Wall v. *United States Mining Co.,* 232 Fed. 613, 616 (1905).
People v. *Palmer,* 43 Hun. (N. Y.), 397, 401 (1887).

To hold otherwise "is to insult common sense. The most convincing evidence is made by the sense of sight."

Foster v. *State,* 70 Miss. 755, 766 (1893).
See 12 *Harvard Law Review,* 212.
See Appendix B to Brief filed in Support of Petition.

VI.

The proposition that a view by the jury in a capital case of the scene of the alleged crime is a part of the trial is forcibly supported by authority and reason.

See Compilation of decisions by States, and also Authorities collected in Appendix A to Brief of Petitioner in Support of Petition.

Of the authorities that seem to hold to the contrary, all are cases where the point was raised for the first time after verdict and where the right was expressly or impliedly

waived with the exception of the two recent instances of *Com.* v. *Belenski,* 276 Mass. 36 (1931), and *Com.* v. *Snyder* (Petitioner); Massachusetts cases.

Valdez v. *United States,* 244 U. S. 432 (1916), was a trial before a single justice without jury, so that the fundamental principles connected with jury trial were not directly involved. *At any rate, the case was one of waiver.* The Chief Justice and Mr. Justice Clarke dissented. The dissenting opinion of Mr. Justice Clarke states that the application of the principle of *Diaz* v. *United States,* 223 U. S. 442, demands a different result.

So also *People* v. *Thorn,* 156 N. Y. 286 (1898), proceeded upon the theory of waiver, and the dictum often relied upon in support of the proposition that view is not part of a trial is not followed in the practical administration of the trials in murder cases in New York. *But it is to be noted that the absence of the trial justice at the view is emphasized in the majority opinion.*

> See excerpts from Proceedings in Records of Appeals in Court of General Sessions, New York County, in case of *People* v. *Lytton* (1931), reported in 257 N. Y. 310; and in *People* v. *Weiner,* (1927) reported in 248 N. Y. 118, both capital cases. (Appendix 1 to *this* Brief.)

If, according to the dictum in *People* v. *Thorn,* errors in the observing of administrative formalities of court room procedure can be availed of by the prosecution where substantial rights are invaded, an instrument of oppression is placed within the reach of the prosecution. Defendants are usually uninformed upon such matters to take advantage thereof.

Other cases claimed to follow *People* v. *Thorn,* and which are collected in Appendix C to Petitioner's Brief in Sup-

port of Petition for Certiorari, upon analysis do not support the judicial expression against right of personal presence. *All are cases of express or implied waiver.*

Counsel for petitioner have been unable to discover a single instance in the judicial history of the entire country (other than the recent instances in Com. of Massachusetts v. Belenksi and that of Com. v. Snyder, Petitioner) where the accused in a capital case was denied the right to be present at a view when the request was seasonably made and not waived.

VII.

There was a denial of effective aid in the preparation and trial of a capital case.

See *Powell* v. *Alabama, supra,* at p. 71.

In the written motion presented to the trial court in behalf of petitioner insisting upon his right to be personally present with the jury at the view, it was also insisted that his personal presence was necessary **"to acquaint his counsel with facts necessary to his defense."** It is no answer to excluding the petitioner from being present at the view, that he *might have been* allowed to visit the scene of the alleged crime at some subsequent stage of the trial without the jury. This is intimated in the opinion in *Commonwealth* v. *Snyder,* the instant case (see Record, p. 31), but the colloquy quoted in the opinion refers solely to a remark addressed to counsel for co-defendant Donnellan and does not purport to include all that was said at the hearing on the view. Reference is particularly made to remarks of counsel for Snyder—**"I object to any view unless my client is present."** And again, "My request is particularly for my client, Snyder, to be there with the jury, to see what they see. I take it that what the jury sees on a view

is evidence and that is evidence against my client" (see Appendix 1 to petition, pages 35, 36 and 37).

To yield to the suggestion that there was sufficient protection by the offer of the trial court, would mean translating a fundamental right into a matter of judicial discretion. The most important use to the defendant of his presence there was when the jury was at the scene—to see what they saw—to observe what the Government considered important—to point out to his counsel what he regarded as essential to his defense to be used then or thereafter in the course of the trial. If the accused did not at the outset insist on his rights, the principle of waiver would have deprived him of the right forever. He was not obliged to speculate upon the mere hope that the trial court *who had once refused* might at some later time change his mind.

VIII.

There was also a denial of equal protection of the law as well as the due process clause of the XIV Amendment. There was a denial of equal protection because the accused charged with a capital offense and in custody without bail had no control over his presence or absence. The order of the court under these circumstances withheld from him the right afforded defendants on bail, or admitted to bail, who are manifestly free to accompany the jury at a view. An order excluding a defendant in these last-mentioned cases would be strongly suggestive of error. **This was the practical effect of the order in the instant case.**

The due process and the equal protection clauses of the XIV Amendment are customarily considered together: "It may be that they overlap, that a violation of one may cover at times the violation of the other, but the spheres of the protection they offer are not conterminous."

Truax v. *Corrigan*, 257 U. S. 312, 331-332 (1921).

Conclusion.

There was manifest error in denying petitioner rights guaranteed him by the Constitution of the United States, and he is entitled to a new trial.

Respectfully submitted,

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APPENDIX 1.

(1927.)

PEOPLE

v.

WEINER.

Record of Appeal from Court of General Sessions, New York County.

THE COURT: (Francis X. Mancuso, J.) I understand the inspection of the Tower by the jury is consented to by both the District Attorney and counsel for the defendant, Mr. Elder.

MR. BROTHERS: Yes, I suggested it and he consents to it.

THE COURT: Do you waive the presence of the defendants or do you want them there?

MR. ELDER: Yes.

THE COURT: Do you want them there?

MR. ELDER: We do not need the defendants. If we should need them, we can send for them, but I do not think we need them.

MR. ELDER: I get your point.

THE COURT: We are not going there for the purpose of taking testimony. They are going there to see the place, that is taking testimony.

THE COURT: I mean taking testimony in the form of witnesses.

MR. BROTHERS: Orally.

MR. ELDER: If a juror should ask a question, it might be that Mr. Brothers and I could agree upon an answer then we both——

THE COURT: In that event you would want the defendant there.

MR. ELDER: Oh, no, when we get back we can stipulate it on the record.

THE COURT: All right.

MR. ELDER: (Continuing) In the presence of the defendants. That would correct any irregularity.

THE COURT: I just want the record clear about all these points——

(1931.)

PEOPLE

v.

LYTTON.

Record on Appeal from Court of General Sessions, New York County.

THE COURT: (Otto A. Rosalsky, J.) Well, counsel will continue his examination upon our return.

In my judgment a view of the premises is necessary.

Now, Mr. Shulman, under authority of *People* v. *Thorne*, 156 N. Y. the Court of Appeals has held that a waiver may be made by the defendant that he accompany the jury.

MR. SHULMAN: I will consent to that.

THE COURT: Does he make that waiver himself?

MR. SHULMAN: I will ask him. Do you consent to waive the right——

THE DEFENDANT: Anything Mr. Shulman says is all right.

THE COURT: You consent to waive your right to go with the jury to the premises?

THE DEFENDANT: Yes, sir.

THE COURT: And to other places designated in the order?

THE DEFENDANT: Yes, sir.